Chapter 8
Transitional Justice in Times of "Exponential Change": Constructing Normative Frameworks Fit for Purpose—The Importance of General International Law

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Abstract In the attempt to reformulate transitional justice to include broader rule of law approaches, there are substantial challenges in ensuring institutional, normative, and policy coherence. Though the rhetoric of the UN policy "pillars" of human rights, development, and peace and security is uncontroversial and commendable, achieving it through tangential legal regimes is problematic. With at least three forms of incoherence at work: within a regime, between legal regimes, and between regimes and the UN's policy goals, ensuring effective responses requires resort to tools of general international law. The chapter comes to three conclusions: first, that as achieving transitional justice requires reliance upon divergent areas of international law, general issues of normative ordering and fragmentation must be confronted. Secondly, normative incoherence can be mitigated through a range of general techniques, including the development of unified substantive ("primary") rules across regimes—using the principle of prevention here as the example—and recourse to treaty interpretation as a secondary tool to maximise rule-linkage. Thirdly, there are a number of meta-, or overriding, principles which might assist with developing an overarching coherence, including the concept of sustainable development and various principles of human rights. Thus, transitional justice as both a policy and legal objective should not eschew, and indeed benefits from, precepts and techniques of the general legal order.

Keywords Rule of law • UN policy goals • Normative fragmentation • Prevention • Interpretation • Sustainable development

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Introduction

This chapter examines how recent trends within the UN system to expand and strengthen rule of law approaches to more broadly defined, and reprioritized, security threats has impacted upon the conceptual foundations and normative frameworks surrounding transitional justice. As has been well-documented, though transitional justice has traditionally been confined to narrowly construed post-military force restructuring—primarily relating to matters of criminal justice, some civil and political human rights, and issues of peace and reconciliation—a plethora of newer approaches are now being included under the rule of law rubric, thereby broadening the scope of both the political and the academic debate.

Notwithstanding such developments, and with particular regard to the normative frameworks that mediate between transitional justice and the rule of law, substantial, as well as substantive, issues remain as to the coherence and effectiveness of the structure that is currently in place. While the international community increasingly has the appropriate rhetoric, premised around the three pillars of the UN system—development, peace and security, and human rights—the contribution of associated legal regimes and institutional processes to these policy-objectives and the governance synergies between them seem decidedly less apparent. Despite these pillars being invariably viewed as being indivisible and interrelated, there is rarely any explanation as to what this might mean in terms of the relationship between the parallel, often quite distinctive, legal norms that relate—sometimes directly, often tangentially—these broader objectives.

In short, this chapter explores the argument whether there is a lack of normative linkage and overarching principle(s) between those areas of international law that are central to the achievement of these broader rule of law approaches to transitional justice, most notably human rights, and principles relating to peace and security, the environment, and development. As will become clear, one of the fundamental strengths of newer approaches to transitional justice is to mainstream, rather than fragment, the applicable law and thus our argument is invariably grounded in general international law. For the sake of clarity, but also recognising its significance, the chapter thus uses a broadly conceived principle of prevention to illustrate the central function of substantive rules in contributing to transitional justice. Recognising divergences in approach, the chapter then addresses how international law's own internal processes—most notably interpretation—may be able to resolve or at least reduce the challenges posed by existing fragmented understandings. The chapter then concludes by returning to the issue of transitional justice and considers how a more integrated approach should support the attainment of post-conflict development. For otherwise, international law is not serving the policy goals that the international community has itself expressly sought; thus raising the broader question as to its fitness for purpose.

Context

There is no universally agreed definition of, or fixed parameters for, "transitional justice". It is, however, generally accepted that the concept is concerned with ensuring adequate "accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs".[1] Thus, as traditionally understood, it has focused on the creation, and implementation, of mechanisms for as long as it is necessary to adequately confront wrongdoers during a period that is often accompanied by transition in the form of political change.[2] Since matters of transitional justice normally arise in the context of the aftermath of the perpetration of extreme human rights violations—such as genocide, crimes against humanity, and war crimes—it is unsurprising that historically the primary focus has been on the associated legal regimes of international human rights, humanitarian, criminal, and refugee law.[3] As Louise Arbour argued in 2006, the parameters of transitional justice have often been very narrowly set as criminal law notions of justice, which in turn can be reflected within restrictive interpretative approaches to their accompanying legal regimes, notably insufficient attention being paid to violations of economic, social, and cultural rights. In response, she advocated the adoption of a much broader approach:

> Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices.[4]

In doing so, Arbour argued that transitional justice situations should afford opportunities to better integrate ESC rights with the legal, political, and social constructs of society, thereby affording "justice" its full meaning.[5] Furthermore, no hierarchy of rights should exist between ESC and other rights.[6] At the very least, sound instrumental reasons for doing so exist, not only to enable "all human rights violations [to be treated] in an integrated and interdependent manner",[7] but also since "transitional justice's additional objective of bringing about social transformation that will prevent a resurgence of conflict" requires addressing all sources of

[1] UN Rule of Law and Transitional Justice Report, para 7.

[2] Roht-Arriaza and Mariezcurrena 2006, 1.

[3] UN Rule of Law and Transitional Justice Report 2004, para 7.

[4] Arbour 2006, 2.

[5] Arbour 2006, 16.

[6] Arbour 2006, 15.

[7] One significant obstacle she identifies is that ESC rights are often treated and misunderstood as being aspirational rather than legally enforceable rights, Arbour 2006, 7.

legitimate grievances,[8] as well as potential future triggers, for example resource scarcity or inequity.

Since these observations were made in 2006, there have been some positive steps in the direction of broadening the concept of transitional justice to consider ESC factors more adequately, though not yet as human rights violations or potential crimes as suggested by Arbour. This was especially evident in the updated report on "Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" issued in 2011.[9] The 2011 report stated that: the UN "is increasingly focused on emerging threats to the rule of law, such as organised crime and illicit trafficking, and the root causes of conflict, including economic and social justice issues. These efforts are proving to be indispensable to a wider peace and security agenda",[10] particularly since "festering grievances based on violations of economic and social rights are increasingly recognised for their potential to spark violent conflict".[11] In doing so, there is recognition that "greater efforts are needed to ensure a unified approach to the rule of law…[including] integrat[ing] security sector reform into the wider rule of law framework".[12]

Of particular note to the current discussion, the UN Secretary-General expressed that the UN would "support initiatives to strengthen the development approach to the rule of law",[13] for example through developing policies on access to justice linked to the promotion of social and economic rights.[14] This is an essential element of transitional justice responses—in parallel with existing criminal justice, peace and reconciliation approaches—if they are to be more effective in the longer term, with both national, as well as wider peace and security, benefits. Some specific areas highlighted by the report included rule of law reform, economic development (accompanied by increased technical understanding of international trade law to, for example, facilitate effective investment), employment, and democratic governance.[15] The UN has also undertaken a number of policy as well as practical steps towards realising this broader concept of transitional justice. A notable one was the establishment of the Rule of Law Coordination and Resource Group, an inter-agency mechanism responsible for the overall coordination and coherence of rule of law within the UN system.[16]

These developments regarding transitional justice approaches need, of course, to be located within wider international discourse and trends regarding the rule of law, as well as broader, more integral approaches to the concept of security and causes of insecurity. Although traditional normative constructs regarding the use of (and restrictions on)

[8] Arbour 2006, 4–5.

[9] UN Rule of Law and Transitional Justice 2011.

[10] UN Rule of Law and Transitional Justice 2011, 3 para 4.

[11] UN Rule of Law and Transitional Justice 2011, 14 para 51.

[12] UN Rule of Law and Transitional Justice 2011, 3 para 4.

[13] UN Rule of Law and Transitional Justice, 19 para 79.

[14] UN Rule of Law and Transitional Justice 2011, 19 para 80.

[15] UN Rule of Law and Transitional Justice 2011, 6 para 17, 15 para 52.

[16] UN Rule of Law and Transitional Justice 2011, 15 para 56.

the use of military force by sovereign States including during times of conflict, and the apparent mutual benefit of the *lex pacis* during times of peace, remain of great importance, emphasis is increasingly placed upon the apparently "softer" notion of human insecurity. While both are dichotomies of security and insecurity, what is of particular concern here is how to fuse together these very different paradigms and associated legal regimes to produce a robust, coherent normative framework that is fit for purpose to meet broader transitional justice objectives.

Recent high-level UN outputs have sought to articulate these shifting priorities and related challenges, including the UN Secretary-General's Action Agenda 2012 for the next 5 years (UN Action Agenda 2012), and "The Future We Want"—the outcome document from the 2012 UN (Rio 20+) Conference on Sustainable Development (Future We Want 2012). It is notable that with respect to the former, it is significant that the Secretary-General identified his number one priority as being sustainable development, the successful attainment of which is critical to human security, and in turn the prevention of conflicts.[17] Thus, since sustainable development is also foundational to the second output, it would seem important to reflect further on the meaning and relevance of the concept, which is dealt with in more detail below.

Sustainable development has now become an accepted aspect of mainstream international diplomacy, having initially been developed within the more limited parameters of the emerging framework of international environmental law in the early 1990s. Of particular significance in the transition of sustainable development from a narrow mediating concept between environmental protection and economic development towards a more all-encompassing meta-principle, including in matters of social justice, was the 2002 Johannesburg Summit on Sustainable Development.[18] Though the 1992 "Rio" Declaration included reference to the fact that "Peace, development and environmental protection are interdependent and indivisible",[19] this was at best inchoate and aspirational. On the other hand, by 2002, particularly following other global conferences on social development and human rights in the 1990s as well as the formulation of the Millennium Development Goals (MDGs), the Johannesburg outcomes were more ably to express the links between governance and participation, development and environmental protection. More specifically, the Johannesburg Plan of Implementation, as it was known, also contained specific references to the relevance of sustainable development to the matter of transitional justice, though these references were contextually limited to the African continent, thus questioning the principled basis on which they were made.[20]

[17] UN Action Agenda Press Release 2012.

[18] How far either sustainable development or the economic basis of transitional justice is premised upon progress towards a particular understanding and/or model to development and economic growth, though this is beyond the remit of this chapter it is important to recognise the role, influence and authority of international organisations and regional agencies, including but not limited to the World Bank, International Monetary Fund and the UN Development Programme.

[19] Rio Declaration 1992, principle 25.

[20] Johannesburg Plan of Implementation 2002, para 65.

Nevertheless, they did at least recognise the linkages between the challenges posed in the attainment of sustainable development and the particular context of transitional justice.

More recently, the debate has moved on again, though not coherently or with a joined-up approach. More positively, a high-level panel report on the MDGs has advocated a pressing need to adopt a broader approach to and paradigm of sustainable development,[21] which focuses not only on poverty-related issues but also on the devastating effects of conflict and violence, as well as good governance. Significantly, including for the purpose of the current discussion, one of the most significant identified shortcomings of the MDGs was the failure to "integrat[e] the economic, social, and environmental aspects of sustainable development as envisaged in the Millennium Declaration."[22] Consequently, despite best efforts, interrelated problems—such as between the environment and development—were never properly integrated, thereby reducing their overall effectiveness.[23] The report also emphasised the need to ensure that universal human rights standards and basic economic opportunities are available to all as well as basic economic opportunities,[24] in addition to making advancements regarding inter alia accountable government and good governance.[25] These themes were then reflected, to a greater or lesser extent, within "The Future We Want Outcome Document" from the Rio conference on Sustainable Development in 2012.[26]

Clearly, such ambitious rhetoric and goals present significant challenges, both for States within what might be termed the ordinary "course of events" (i.e. the *lex pacis*) and specifically for those States transitioning from a conflict situation. The focus of the remainder of this chapter is therefore on whether the necessary normative framework to facilitate these policy objectives is currently in place; and, if not, how it might be better implemented. Secondary rules of treaty interpretation and law-reconciliation have a particularly significant and influential role to play. Nevertheless, secondary rules by themselves do not achieve political outcomes. Thus, whereas section 5 focuses particularly on the rule of interpretation as an important secondary rule in international law, section 4 focuses upon one particular substantive principle of law and policy fundamental to supporting transitional justice, namely the obligation-cum-process of prevention. This is another of the UN Secretary-General's priorities, which in this context includes not only traditional constraints upon State action in a broad field of activities (e.g. human rights abuses, the unlawful use of force) but equally is concerned more broadly with such areas as "[s]upport[ing] the development and implementation of national disaster risk reduction plans", and "[b]uild[ing] resilience to external economic and financial

[21] Post-2015 Development Agenda 2013, 8.

[22] Post-2015 Development Agenda 2013, 7.

[23] Post-2015 Development Agenda 2013, 7.

[24] Post-2015 Development Agenda 2013, 8.

[25] Post-2015 Development Agenda 2013, 9.

[26] Future We Want 2012, para 3.

shocks".[27] However, before considering either issue, the chapter discusses the general normative framework that surrounds transitional justice, highlighting in particular the disjointed "fit" between the policy objectives and the tangential legal regimes being relied upon to achieve these goals, lacking coherence within themselves as well as the objectives they are said to serve.

Normative Framework

In terms of the applicable normative framework for such an increasingly broad and integrated approach, it would seem natural to centre this on the UN's three pillars: development, peace and security, and human rights. Certainly, this is reflected in, for example, the Rio Outcome Document which expressly "reaffirm[s] the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, women's empowerment and the overall commitment to just and democratic societies for development".[28] For each of these pillars, there are reasonably well developed and established legal regimes, though admittedly in the area of development, the vagaries of institutions, processes, and norms is such that it lacks much of the normative coherence of the other regimes, notably human rights. Notwithstanding this caveat, a key challenge therefore, which is the central focus here, is not the creation of new applicable norms, but how existing ones and inherent assumptions[29] of the regimes might link together in a sufficiently systematic manner to facilitate the achievement of wider goals, policies, and practices. While there is some ongoing discussion as to how these regimes might interact bilaterally—such as environmental law with human rights; and peace and security with human rights—not only is there much more work to be done on these matters, but there is significantly little discussion regarding their more complex triangular relationship.[30] This chapter seeks to make a modest contribution in this regard illustrated within the context of transitional justice.

Young identifies four key features that can influence interactions between different legal regimes and create associated challenges for the creation, implementation, or enforcement of international law:

> First, the relevant laws were largely developed at different times. Secondly, they are implemented by different institutions, which have different powers of enforcement and relative strengths. Thirdly, there is not uniform ratification of these laws by all states. They are *mostly*

[27] UN Action Agenda Press Release 2012.

[28] Future We Want 2012, para 8.

[29] Young 2012, 6.

[30] UNSC Res 1963 (2010), UNSC Res 1963 (2010) states that "development, peace and security, and human rights are interlinked and mutually reinforcing…". (Preamble, and similarly in para 10, in a counter-terrorism context), yet does not explain how this is so in terms of the normative relationship between their underpinning legal regimes.

> agreed by the same states, of course, but there are differences, and some members meet the membership requirements of some but not all the relevant organisations. Fourthly….these laws aim to fulfil particular sets of preferences within the international legal system,[31] which may not be in harmony.[32]

Related challenges are how to strengthen the frameworks within each pillar, not only institutionally—as highlighted, for example, in the Rio Outcome Document with respect to sustainable development, to strengthen coherence, coordination, and to avoid duplication of efforts[33]—but normatively too. Indeed the Outcome Document further recognised that the effective promotion of sustainable development goals "requires the meaningful involvement and active participation of regional, national and subnational legislatures and judiciaries".[34]

A specific central challenge identified in the Outcome Document is that of fragmentation.[35] Certainly, the UN is uniquely positioned to respond to current and emerging global challenges, including on broadly defined rule of law, social, economic, development issues, "because it can provide integrated solutions across interconnect issues such as development, peace and security, human rights and humanitarian action".[36] Although the observation on fragmentation was made regarding existing institutional frameworks it is equally true at the normative level, not only regarding the coherence of the relationship between principles and rules within but also between legal regimes. Consequently, the issues examined here need to be understood within the wider context of the fragmentation of international law too, namely tensions existing between the norms of different legal regimes which create divergence rather than convergence in terms of create a truly coherent system of international law. As Young observes, this is not simply about how legal norms may conflict, but rather extends to "novel explorations of the way in which, in the default situation of diversity and concurrent activities, norms and institutions from disparate legal regimes interact".[37] Nor can this exercise be limited to existing and emerging principles, but should be accompanied by often unnoticed interaction between different legal regimes.[38] As such, the scope of enquiry here needs to extend beyond the parameters of the International Law Commission's Study Group on the fragmentation of international law, which was largely confined to considering how to reconcile conflicting norms that already exist in the form of treaty or customary international law. Furthermore, the nature of the relationship between different legal regimes is not static, instead it is constantly evolving.

As the specific principle examined below reveals, that of prevention—it can have quite different meaning and effects within different legal regimes. In some

[31] Young 2012, 89.

[32] Young 2012, 88–89.

[33] Future We Want 2012, para 75.

[34] Future We Want 2012, para 43.

[35] Future We Want 2012, para 76(d).

[36] UN Action Agenda 2012, 1.

[37] Young 2012, 1.

[38] Young 2012, 1.

circumstances the general absence of a hierarchy of norms in international law with the exception of *jus cogens*—the highest category of norms which are non-derogable and absolute, such as the prohibitions against torture, genocide and apartheid—could be considered a weakness, or at least a further source of uncertainty, for example where conflicts of norms arise. In other circumstances, however, it could be considered a benefit since it affords much flexibility as well as creativity of approach to better integrate parallel norms of different legal regimes. Some suggestions as to how this might be possible are considered below (Section 5).

Nevertheless, the lack of coherence between regimes should not be underestimated. As legal rules and institutions have developed endogenously from within their own institutional backgrounds, the lack of linkage with other legal regimes has often per se not been considered problematic. Indeed, as international law is characterized with such normative inconsistencies at all levels, it is perhaps not surprising that the international community struggles to develop coherent rules particularly around contentious issues.

Beyond this, there is the equally challenging matter that the UN's "pillar" objectives and the associated legal regimes are just that—"associated". The legal regimes were often not developed to meet the policy goals of the UN, apart from at their most generic level (i.e. promotion of human rights), and certainly are rarely designed to meet the particular challenges of new situations, notably here those associated with transitional justice. Thus, at best, regimes such as environmental treaties provide proxy support for the broader objectives of the UN, rather than being directly instrumental to the attainment of particular goals.

Consequently, there are at least three different forms of uncertainty and incoherence at play here: within a legal regime, between legal regimes, and between the regimes and "related" policy goals. Thus, when considering in section 5 the value of interpretation as a means of integrating norms, it will be important to keep in mind each of these distinctive, though related, modes of incoherence. And how far interpretation can stretch to accommodate each—and all—forms of fragmentation. To that extent, the attempt by the international community to implement the principle of prevention as more than a piece of rhetoric but, in fact, an overarching norm is especially instructive.

Principle of Prevention

The principle of prevention is one of those norms of international law which one might have thought was easily distinguishable and definable. As a reasonably "simple" rule in the abstract, a principle of prevention would seem a natural contender as a general principle of law. However, as soon as one raises this proposition, the problems seem almost endless: prevention of what? By whom? How? By when? And there are many more. Even within the context of the transitional justice context, whilst the principle of prevention would seem to have a clearer meaning—namely to prevent the recurrence of further conflict—it fails to address many important

aspects, such as whether the obligation is essentially a negative one (to avoid the repeat use of force) or a positive one (to address the key underlying factors that led to conflict in the first place, as well as deal with the aftermath and resultant violations of international humanitarian law of the previous conflict), or perhaps both.

Moreover, in addition to such uncertainty there is the broader question whether one can talk about a normative principle of prevention at all. Certainly, there are discrete preventative obligations in many areas of international law, though whether there is any form of connection between them is uncertain and potentially unlikely. To take but three examples—the poorly named "no harm" principle from international environmental law (Rio Declaration 1992, principle 2), the duty under Article 2(1) of the International Covenant on Civil and Political Rights 1966 (ICCPR) to "respect and to ensure" civil and political rights, and the generally accepted customary obligation that "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts" (1970 Friendly Relations Declaration).

As is immediately obvious, these obligations are wide-ranging in content, wording, and scope. Some international law obligations are extraterritorial in nature (i.e. not to cause transboundary harm) without a seemingly similar obligation domestically, whereas for other obligations, the obligation is primarily territorial (i.e. human rights) with a broader question as to its extraterritorial extent. Some obligations are primarily focused on regulating State measures (for example, direct use of force), others on ensuring States regulate the acts of others (for example, private actors), and many contain an element of both. The human rights requirement of "to respect and to ensure" neatly captures this dichotomous obligation. Thus, a secondary question arises as to the expected standard of behaviour of the State when it is a private actor that has caused the harm, rather than the State itself. There is general, though universal, support for the idea of due diligence being the requisite standard, whatever that means in any particular context, when the State's responsibility lies in regulation and enforcement, rather than primary action.

It is beyond the scope of this chapter to consider whether a singular principle of prevention can be said to exist in international law at the present time, whether generally or within specific contexts such as transitional justice. Rather, what is of importance here is that the UN policy objectives in the area would invariably seem to suppose the existence of such an obligation, and its absence thus creates a disjoint between policy goals and normative capacity. This is best illustrated by some of the overarching goals of prevention highlighted in the Secretary-General's 2012 Agenda to:

> "Support the development and implementation of national disaster risk reduction plans that address growing challenges of climate change, environmental degradation…".
>
> "Prioritize early warning and early action on prevention violent conflict by….[e]nsuring that UN good offices, mediation, crisis response and peacebuilding services are easily and rapidly deployable".

> "Advance a preventive approach to human rights by……[d]eveloping a policy framework that identifies basic elements needed to prevent human rights violations…".[39]

As has been commented elsewhere regarding this Agenda in the context of counter-terrorism:

> [I]t is essential that this agenda is not limited solely or principally to institutional and procedural aspects of the UN's architecture, but rather that equal focus is given to its substantive elements. Both are important and inherently related—measures to strengthen one limb will not achieve their full potential and reach without corresponding and parallel efforts being afforded to the other.[40]

Since there is no one approach to the concept of prevention or related preventive responses within individual legal regimes, efforts to adopt a coherent, meaningful approach spanning numerous legal regimes is thus going to be a herculean task.[41] Moreover, the UN goals cover a wide range of threats, from the natural to the man-made. Not all require a similar response, or are easily achieved. Nor is it apparent that law always is the most prominent, or appropriate, tool. That said, as the discussion next on human rights indicates, there is significant scope for prevention to play an important role, though the human rights regime is not without its own internal normative challenges. Nevertheless, despite having diverse meaning, is there scope for such a principle to have an even greater role in providing such connections between legal regimes, which are not otherwise easily interlinked, through shared—if as yet unearthed—common assumptions to support global objectives?

The Principle of Prevention and the Human Rights Regime

As was just mentioned, one of the preventive goals identified in the UN Secretary-General's 2012 Agenda is to "[a]dvance a preventive approach to human rights by……[d]eveloping a policy framework that identifies basic elements needed to prevent human rights violations…". A primary, overarching goal of human rights principles and rules is to prevent the occurrence of human rights violations in the first place. This goal underpins the drafting of many key human rights principles—such as the absolute prohibition against the arbitrary denial of the right to life (Article 6 ICCPR), and any use of torture, cruel, inhuman or degrading treatment or punishment (Article 7 ICCPR)[42]; prohibition against arbitrary arrest or detention

[39] UN Action Agenda 2012, 5–6.

[40] Samuel, White and Salinas de Frías 2012, 1.

[41] This is equally true of the principle of due diligence, which is often linked to the principle of prevention, and its resultant obligations on state officials. See, for example, the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework (21 March 2011) UN Doc A/HRC/17/31, para 6.

[42] See too Art 2(1) Convention against Torture 1984 (CAT) which states: 'Each State Party shall take effective legislative, administrative, judicial or other measures to *prevent* acts of torture in any territory under its jurisdiction'.

(Article 9 ICCPR), and discriminatory treatment (Article 26 ICCPR)—as well as other provisions aimed at the humane and fair treatment of, for example, detainees or accused persons to prevent their mistreatment or any unfairness (Articles 10 and 14 ICCPR). Recognising that these protections are often not fully afforded in practice, human rights instruments also make provision to deal with the consequences of their violation, such as civil remedies (Article 2(3) ICCPR) and in some cases criminal sanctions (Article 4 CAT),[43] which similarly have an overarching objective of deterrence to prevent future recurrences. It is evident, therefore, that overarching human rights goals can have the effect of producing coherent, and therefore more effective, norms and mechanisms.

The human rights regime, however, is not without its own challenges in terms of developing consistent approaches, notably the interpretation and application of key principles, as the principle of prevention reveals. Notably, there is no universally agreed definition of prevention. Consequently, its normative parameters are not entirely clear, illustrated by the spectrum of recent governmental as well as intergovernmental counter-terrorism efforts. Here, the concept of "prevention" and its associated legal or at least legitimate responses have meant anything from sanctions on state and non-state actors, to reliance upon often broadly or ambiguously drafted anti-terrorism legislation, administrative detention which can be indefinite in nature, military courts and commissions not affording full fair trial guarantees, questionable interrogation methods which can be coercive in nature, targeted killings of suspected terrorists including through the controversial use of drones, and expulsions which seek to (mis)use the framework for the protection of refugees and asylum-seekers for counter-terrorism purposes.[44] The absence of clearer parameters poses a further obstacle to ensuring adequate levels of accountability and to closing existing or potential impunity gaps.

Other internal coherence challenges exist too, that have implications for the adoption of broader approaches on human rights themes in a transitional justice context. ESC rights are often different in their normative framing compared with civil and political rights. In contrast to ICCPR provisions, which are often framed in clear prohibitive and/or preventive terms, the substance of ESC provisions tend to be framed as positive obligations to make progress towards their realization rather than in preventive terms.[45] This is illustrated by the text of the International Covenant for Economic, Social and Cultural Rights 1966 (ICESCR), where "prevention" is only expressly mentioned in relation to preventing "epidemic, endemic, occupational and other diseases" (Article 12(2)(c) ICESCR), and permitting certain

[43] Art 4 CAT provides that: 'Each State Party shall ensure that all acts of torture are offences under its criminal law.'

[44] Samuel, White and Salinas de Frías 2012, 1, 18–35.

[45] General Comment 15, See for example para 18: "States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water."

restrictions to be lawfully imposed on the exercise of the Covenant's rights by members of the armed forces or the police in the administration of the State.[46]

That said, the Committee on Economic, Social and Cultural Rights (CESCR) has attempted to overcome at least some of these difficulties in its General Comments through its interpretation of some positive treaty obligations to include a preventive element. For example, the obligation on States Parties "to *prevent* third parties from interfering in any way with the enjoyment of the right to water."[47] Other obligations too have been interpreted in a way that implies preventive strands, such as the obligation to *respect* which "requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to [e.g.] water"[48]; as well as an obligation to *fulfil* which can be "disaggregated into the obligations to facilitate, promote and provide…"[49] and "requires States parties to adopt the necessary measures directed towards the full realization of the right to water."[50] There can also be preventive aspects associated with these rights, such as the duty upon States parties under their international obligations "to *prevent* their own citizens and companies from violating the right to water of individuals and communities in other countries".[51] A preventive element may also take the form of a duty of abstention on States parties, illustrated by the requirement of "non-interference with the exercise of cultural practices and with access to cultural goods and services",[52] unless there are legitimate reasons for doing so.[53] Additionally, one of the clearest forms of prevention in the ICESCR is the overarching prohibition against discrimination in the exercise of its rights.[54]

In practice though, many of these positive ESC obligations with preventive elements are more difficult to determine than their civil and political rights counterparts, particularly since a determination usually needs to be made between whether a government was unwilling or genuinely unable through resources constraints to

[46] Article 8(2) ICESCR.

[47] General Comment 15 2003, para 23, emphasis added.

[48] General Comment 15 2003, para 22.

[49] General Comment 15, para 25.

[50] General Comment 15 2003, para 26.

[51] General Comment 15 2003, para 33, emphasis added.

[52] General Comment 21 2009, para 6.

[53] General Comment 21 2009, paras 17–19.

[54] Articles 2(2) and 3 ICESCR, There is no separate principle of non-discrimination in the ICESCR in contrast to Art 26 ICCPR. See for example CESCR, General Comment 20: "Non-discrimination in economic, social and cultural rights" (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/20 (2 July 2009), para 8 which states that 'States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.'

meet an obligation.[55] Furthermore, it may also be necessary to establish that the government concerned failed to act in good faith.[56] That said, some ESC rights are now considered to be non-derogable including the duty to prevent disease in relation to the right to water.[57]

It is evident that a number of ICCPR and ICESCR provisions expressly or impliedly incorporate preventive elements, though it is often easier to prove the violation of, as well as to enforce, civil and political compared with ESC rights. Furthermore, it is apparent that some of the related internal coherence challenges within the human rights regime can be overcome or at least mitigated through the interpretative approaches adopted. This is important too if the rhetoric that no hierarchy exists between civil and political rights and ESC ones is to become more of a reality in practice, making the achievement of the sought broader goals of transitional justice more realisable.[58]

Transitional Justice Policy Goals and General International Law

As the discussion so far has revealed, significant tensions and associated normative challenges exist between the rhetoric of broader transitional justice goals (for instance, seeking to better incorporate ESC rights) and their achievement in practice. Additionally, the analysis has shown that principal explanations for these include the challenges of attaining normative coherence not only internally within a particular legal regime but also externally in terms of how the norms and goals of one regime interact with those of another.

With respect to the issue of internal normative coherence, as the discussion of human rights and the principle of prevention illustrate, one way of achieving or at least improving this is through the tool of interpretation. The question therefore remains whether this and/or other tools exist that can improve the external interaction of norms. This is central to whether and how broader transitional justice policy goals, which are centred on the triangular relationship existing between the UN's three pillars: development, peace and security, and human rights, may be realisable.

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[55] General Comment 15 2003, para 41, 'A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined [here].'

[56] General Comment 15 2003, para 40.

[57] General Comment 15 2003, paras 37 and 40.

[58] Though no hierarchy exists between these rights in the Universal Declaration of Human Rights 1948 (UDHR), arguably the subsequent division of these rights into the ICCPR and ICESCR introduced an unhelpful distinction between them that did not exist previously, arguably making the UDHR more progressive as an instrument.

In terms of possible tools, that of interpretation is of particular significance. As the ILC Fragmentation Study noted, "the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation" is not confined to situations of conflict, equally it may be one of interpretation: "This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction."[59] Certainly, one possible way of diffusing and reconciling at least some of the discernible differences existing between the three pillars may be for specific principles—such as prevention—to be interpreted through a common paradigmatic lens, for example that of human rights, in order to produce a common narrative between them. One NGO during the consultation process that took place prior to the Rio Summit suggested that:

> The language and action of a Human Rights Based Approach is key to the paradigm shift and serves as an overarching guide to systemic change. Focusing on the protection and realization of human rights, it provides a framework that addresses the most marginalized and excluded in society, strengthening social, political, economic and environmental justice and equity. Human rights principles (e.g., participation and inclusion, accountability) can drive every activity, across any sector and become part of the design, implementation and monitoring of sustainable development policies and programs. The Human Rights approach coexists with many key Rio Principles—including common by differentiated responsibilities, access and participation, gender equality, polluter pays and the precautionary principle—that should remain part of any new vision because they intimately tie together the three pillars.[60]

Though the task of developing such common narratives will be complex and no doubt often contentious too, it is by no means an impossible one. In fact, the significant potential benefits of doing so are illustrated by the detailed analytical study undertaken by the Office of the High Commissioner for Human Rights in 2008 on the relationship between climate change and human rights. Its overall conclusions were that a broad number of human rights were interfered with by climate change that states were under a legal obligation under international human rights law to protect.[61] As Dunoff observes, "[t]he goal of this effort is nothing less than a reconceptualisation of the climate issue" beyond being solely a scientific issue.[62] Certainly, the need for some form of a "global, overarching, cross-thematic framework for development after 2015…"[63] has been advocated by inter alia civil society in relation to the shortcomings of the MDG framework. The recognised need for human rights based accountability, including participation rights, and transparency to improve governance and institutions for global sustainability, enforced by effective accountability mechanisms,[64] should be achievable across the three pillars.[65]

[59] ILC Fragmentation Study 2006, conc 2.

[60] UN-NGLS Report 2011, 7.

[61] See further OHCHR Report 2009.

[62] Dunoff 2012, 171.

[63] UN-NGLS Report 2011, 7.

[64] UN-NGLS Report 2011, 20.

[65] UN-NGLS Report 2011, 15.

Indeed, alternative paradigmatic lenses could take the form of broader concepts such as transparency, accountability, or legitimacy.[66]

Though it may be possible to bring increased coherence to the interpretation of specific principles within different legal regimes by interpreting them through a common paradigm, this will not be possible in all cases due to some inherent features of international law. For example, where greater coherence is sought in relation to treaty norms, despite the rules of treaty interpretation contained in Article 31 Vienna Convention on the Law of Treaties 1969, there may be different national approaches to the interpretation of the same treaty provision within a particular regime. As Matz-Lück observes:

> The content of the norm as determined by interpretation is crucial for the establishment of the parties' rights or obligations. Yet often the different elements of interpretation allow for a wide array of conclusions concerning a norm's meaning and content. A drafting practice that keeps treaty language deliberately vague in politically contested fields gives considerable room to the individual party in the interpretation process.[67]

Further challenges may be posed by the very nature of public international law, which is predominantly non-hierarchical in nature. Therefore, with the limited exception of *jus cogens* norms, there is little in the way of guiding principles or standards determining which interpretative approach should prevail over another where normative conflicts arise. Furthermore, it would appear that the very nature of specialist regimes is that overall uniformity of standards is not an objective of their law-making activities or developments. Instead it is important that, "standards, norms and procedures specifically designed to address a certain issue shall not be sacrificed in the name of coherence",[68] so that they remain fit for purpose. That said, "specialisation must not mean that either the wheel has to be reinvented concerning the underlying fundamentals of a transnational legal regime or that interdependence resulting from an overlap of issues, definitions, parties, financial mechanisms and, generally, being part of the same overarching legal system, should be completely neglected".[69]

Such differences may be mitigated through, for example, the authoritative interpretations of judicial bodies, though these too may not be consistent in their approaches, illustrated by the diversity of national, regional, and international approaches to determining the scope and effect of Article 103 UN Charter.[70] Alternatively, some form of tacit or express agreement regarding the interpretation of particular principles may be reached between interested parties, which may

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[66] Dunoff 2012, 139.

[67] Matz-Lück 2012, 210.

[68] ILC Fragmentation Study 2006, conc 2(13) 4, Conclusion 2 (13) states: '*Effect of the "speciality" of a regime*. The significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.'

[69] Matz-Lück 2006, 209.

[70] For example, *Kadi and Al Barakaat* (2008), *R* (*Al-Jedda*) *v Secretary of State for Defence* (2007), *al-Jedda v United Kingdom* (2011), and *Sayadi and Vinck v Belgium* (2008).

afford greater certainty—at least between those parties—but have the disadvantage of being less authoritative. Associated challenges here include the infrequency of relevant cases before the International Court of Justice (which may in any event interpret the parameters of the issues before it narrowly) (for example, *Kosovo Advisory Opinion* (2011)) to determine clear principles and guidelines of the resolution of normative conflicts.

A different approach may be to "consider the utilisation of norms [for example, when interpreting treaty texts] stemming from other regimes as interpretative guidance in a broader sense, i.e. as an idea rather than a clear methodological approach",[71] with different degrees of integration achievable dependent upon particular instruments and contexts. This might be easier to achieve in practice as it would not require formal consensus, and would allow more flexibility to reflect the specialist nature of particular norms depending on the context (Matz-Lück 2012, 209–210). At the very least, such an approach might lead to the crystallisation of overarching elements relevant to each of the three regimes, resulting in increased systematic coherence.[72] Certainly, drawing upon other international law instruments (i.e. ones broader than those applicable to one particular regime), aimed at striking a balance between increased unity among the corresponding norms of different regimes while retaining their necessary specialist diversity, might strengthen their cross-fertilisation.[73] A primary benefit of such an approach would be seeking to minimise the areas of normative tension and difference between the three UN pillars' legal regimes to achieve improved inter-regime coherence based on common principles and standards. As Matz-Lück suggests, "a systemic vision of public international law would be promoted by the open approach to take into account all relevant instruments. At the same time the interpreting institutions would be flexible to choose which instrument they find the most helpful in order to reach effective solutions for the understanding and further development of their regime."[74]

Some potentially problematic issues with such approaches exist though. One is the unresolved "question of who has the competence to interpret an international treaty by taking into consideration norms which were agreed in a different context and setting and, potentially, by different parties".[75] The situation is not assisted in some instances by the paucity of international jurisprudence offering definitive or guiding principles in such circumstances. Furthermore, "[u]nless the parties decide collectively on the interpretation of a provision by authoritative interpretation, there is hardly any clear guidance on the understanding of a norm."[76] Indeed, those who interpret these norms, particularly at the governmental and intergovernmental levels, may be enticed to engage in unhelpful, unpredictable or even arbitrary "cherry picking" of interpretations that suit their purposes which may not (fully reflect)

[71] Matz-Lück 2012, 209.

[72] Matz-Lück 2012, 211.

[73] Matz-Lück 2012, 232.

[74] Matz-Lück 2012, 232.

[75] Matz-Lück 2012, 212.

[76] Matz-Lück 2012, 213–214.

well established rules on treaty interpretation.[77] Such weaknesses are reflective of broader characteristics of international law, namely the presence of "not very much in terms of an informing meta-principle from which answers can be deduced by the application of a reason, or a shared allegiance to the system of law amongst the actors who deal with it"[78]; what Dunoff describes as the absence of a "redemptive narrative".[79]

A related, yet different scenario is when international tribunals or courts are engaged in the interpretation of norms, for example in the context of dispute settlement, when they are required to consider regime interaction. As Dunoff observes, the nature of litigation is that it:

> ….involves a highly atypical form of regime interaction….obscur[ing] the most common—and most important—forms of the phenomena under study. Just as importantly, a focus on courts is of limited utility as international judges lack the jurisprudential tools necessary to resolve the doctrinal tensions that arise when diverse international legal regimes overlap and collide. As a result, analysis of judicial decisions sheds little light on the causal mechanisms through which regimes impact upon and influence each other.[80]

Furthermore, litigation is by its very nature retrospective. Consequently, Dunoff argues in favour of a broader, forward projecting, paradigmatic approach of what he terms "relational interactions": "[I]nstead of searching for *the* governing norm, relational interactions explicitly acknowledge that multiple regimes often can and do exercise concurrent authority over actions or events. Hence, relational interactions are often directed towards the articulation of new international norms to prospectively govern behaviour within a particular area of international relations. Thus these interactions are often 'juris-generative', or law-creating."[81] Such an approach would attach greater significance and influence to non-judicial contexts where inter-regime interactions are more commonplace.

Another possible solution may be to consider parallel principles drawn from different regimes through the prism of the principle of harmonisation. As the ILC Fragmentation Study suggests:

> In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization.[82]

This approach seeks to interpret international norms "so as to give rise to a single set of compatible obligations",[83] achieved through mutual consent so far as this is

[77] Matz-Lück 2012, 233.

[78] Crawford and Nevill 2012, 259.

[79] Crawford and Nevill 2012, 259.

[80] Dunoff 2012, 137.

[81] Dunoff 2012, 138.

[82] ILC Fragmentation Study 2006, conc 26.

[83] ILC Fragmentation Study, 2006, conc 4.

achievable. Difficulties with such an approach may include where any of the principles concerned have *jus cogens* status, which are not only non-derogable, but must prevail over any incompatible "inferior" norms.[84]

Of particular relevance here is the potential for sustainable development to be utilised as an overarching framework for the resolution of norm-conflicts. Over the past 20 years, the concept has been increasingly relied upon in institutional and judicial settings to seek to bridge normative and institutional divides. For the purposes of this chapter, it is not possible to develop the argument in full—nor is it necessary to do so in full in the transitional justice context. But certain key themes have developed that are of relevance. First, sustainable development has a conceptual quality that spans both intergovernmental negotiation and judicial resolution, thus bringing together policy and law, not invariably seamlessly but certainly providing much broader scope for reconciliation. For instance, reliance by the concept by the World Trade Organization Appellate Body in its *Shrimp-Turtle* (1998) dispute, in which the Appellate Body recognised that sustainable development provided "colour, texture and shading to our interpretation of the agreements" is perhaps particularly noticeable in this regard. Of course, the Appellate Body was able to rely upon the inclusion of sustainable development within the express wording of the preamble of the WTO Marrakech Agreement to justify this reference. However, it is equally apparent from the jurisprudence of both the International Court of Justice and arbitral tribunals that sustainable development has an autonomous form that exists outside of treaty texts. Very famously, the International Court of Justice in *Case Concerning Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (1997), remarked that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".

And though this has been subject to much debate and contention as quite what was meant by this, the International Court of Justice has—in a measured fashion—reaffirmed, and given *some* effect to this meaning in the later *Case Concerning Pulp Mills* (2010) by noting the "interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development" (para 90). Of particular interest here, is not the reference to equitable utilisation of watercourses, the specific context in which it was used, but rather the integration of traditional legal reasoning and more recent policy-cum-normative import. On the one hand, it is the case of the latter (recent innovation) informing the former (pre-existing legal rules), to the enrichment of the former, but equally there is more going on here; there is an attempt at more holistic synthesis which is worth noting; the standards, norms and expectations of both are integrally linked. A similar approach comes across in the arbitral tribunal award in *Iron Rhine* (2005), in which the tribunal noted in a remarkably discursive manner the importance of an evolutive interpretation of treaty in the face of "strict application of the intertemporal rule", thus ensuring "an application of the treaty that would be effective in terms of its objective and purpose" (para 80).

[84] ILC Fragmentation Study 2006, conc 42.

This is not to suggest that sustainable development is somehow a theory-of-everything, which will either provide the normative answer to all these issues of fragmentation or invariably has within itself substantive coherence, but it has provided a useful tool for courts and tribunals to try to reconcile competing claims and disparate objectives. As described above, it is most usefully viewed when seen as an element of interpretation. Indeed, whenever there is an attempt to move beyond that and to provide it (or similar concepts) with substantive content, there is a genuine reluctance amongst both States Parties and judicial bodies to confuse and conflate treaty obligation and non-treaty principle. Thus, if no more than an exemplar of what can be achieved through such open-concepts, sustainable development highlights the benefits (and challenges) of finding cross-cutting tools to assist with interpretation and integration.

So, returning to the question posed whether or not broader transitional justice policy goals are normatively achievable within the current framework, the answer must be that this is certainly possible. General international law offers a number of tools, including interpretative approaches, tools of harmonisation, as well as the jurisprudence of international courts and tribunals. It is apparent too that in some circumstances interpretative solutions may well lie within the legal regimes of the three pillars themselves, such as using the concept of sustainable development or human rights principles as lenses through which to interpret parallel norms in pursuit of normative coherence. Increased integration and coherence will only be possible however to the extent that the necessary political will is present to overcome the associated complexities and potential obstacles.

Conclusion

In coming to the end of this chapter, we would argue that there are, in principle, three reasons to consider transitional justice in the broader context of the international legal order. First, that as the goals and rules relating to transitional justice are very much part of the international political and legal order, general issues of normative fragmentation are as relevant to its deliberation as any other. Secondly, that as transitional justice contains within its very rationale the integration of disparate areas of regulation, it invariably requires reconciliation between, and amongst, such rules. The previous discussion of the principle of prevention has highlighted both the potential for a cross-cutting norm, as well as the challenges for its implementation. Thirdly, there are a number of meta-, or overriding, principles which might assist with developing an overarching coherence, including the concept of sustainable development and various principles of human rights.

The first conclusion is that though transitional justice has its particular normative demands and requirements, we would argue that there is no *lex specialis* evolving around it, perhaps in contrast to the emerging policy and institutional framework that has been developing in parallel, particularly during the last 20 years. This is not to say that such a *lex specialis* will not develop, nor that over time this would not necessarily be a good thing. Rather, we see a divergence between the speed of

progressive policy initiatives in the area of transitional justice in contrast to the development of accompanying legal principles and rules to effectively implement them. And the consequential effect is that transitional justice remains subject, to a greater or lesser extent, to a patchwork of general rules of international human rights, humanitarian, criminal, and environmental law, inter alia. To that extent, transitional justice also benefits—and suffers—from the same challenges of general international law, and will need to take advantage of any secondary rule or process that general international law has to offer.

The second conclusion is that since transitional justice is invariably premised upon integration of a range of policy areas to achieve a reasonably broad, but still identifiable outcome, namely an ordered peace and reconciliation (in whatever form) in a post-conflict situation, the above conclusion—that of the relevance of, and reliance on, international law—becomes especially significant. This breaks down further into two aspects, namely the further evolution of, and identification of specificity in, relevant primary norms (for example, the principle of prevention) especially as a means of promoting cross-cutting relevance; and secondly, the development and refinement of secondary rules of reconciliation and interpretation. As noted above, secondary rules cannot by themselves achieve policy objectives, though they do play an important role in their instrumentalization.

In particular, the above discussion on the principle of prevention reveals a myriad of meanings across a diverse array of legal sub-disciplines, with a greater or lesser degree of convergence—few of which are specific to the transitional justice context. There is a job-of-work to do to consider whether greater harmonisation is possible and specifically within the particular situation of post-conflict societies, but until there is political will to do that, the international community will need to rely on the rather generic nature of the primary norms. And this is where the secondary rules of interpretation and reconciliation potentially come into their own, providing decision-makers, institutional frameworks, and judicial bodies the discretion if they so wish to exercise it to model a bespoke response within the accepted parameters of what the international community originally intended for the primary norms. Thus, within this context, and as the discussion on the principle of prevention reveals, normative diversity abounds and despite the appeal of an easily defined obligation, discerning shared and common assumptions is, in fact, hugely complicated as well as inherently political.

Finally, it seems appropriate to note the relevance of meta- or overarching principles to provide both normative coherence and mediation between legal regimes. The rule of law and human dignity, for example, might both provide starting points for the development of a more holistic legal regime. Particular reference was made to sustainable development. This has relevance both in the general tension between the environment and development, in which it has found clearest expression, but also potentially more specifically within the context of transitional justice. This is not to suggest that it provides an all-embracing norm, as clearly it does not. Sustainable development may have things to say, for instance about good governance, but clearly it is stretching the concept to include matters of criminal justice and reconciliation. Nevertheless, as one amongst a number of meta-principles that could be used to provide an overarching normative framework for transitional justice—a framework

that as has already been noted is not yet fully elaborated—it will provide a necessary, if not sufficient, aspect. To the extent that the policy imperatives inherent within transitional justice are a priority for the international community, this is an area in need of urgent reform, as well as an interesting ongoing experiment in law-development. But this is not legal specialisation in a policy or legal vacuum; transitional justice as both a policy and legal objective does not eschew, but indeed benefits from, precepts and techniques of the general legal order.

Bibliography

Books

Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006).

Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006).

Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation.* (Cambridge: Cambridge University Press, 2006).

Book Chapters

James Crawford and Penelope Neville, "Relations between International Courts and Tribunals: The 'Regime Problem'," in *Regime Interaction in International Law: Facing Fragmentation,* ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012).

Jeffrey L. Dunoff, "A new approach to regime interaction" in *Regime Interaction in International Law: Facing Fragmentation,* ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012).

Nele Matz-Lück, "Norm interpretation across international regimes: competences and legitimacy," in *Regime Interaction in International Law: Facing Fragmentation,* ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012).

Margaret A. Young, "Introduction," in *Regime Interaction in International Law: Facing Fragmentation,* ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012).

Margaret A. Young, "Regime interaction in creating, implementing and enforcing international law," in *Regime Interaction in International Law: Facing Fragmentation,* ed. Margaret A. Young, (Cambridge: Cambridge University Press, 2012).

Reports, Press releases et al.

Louise Arbour, "Economic and Social Justice for Societies in Transition," Second Annual Transitional Justice Lecture (25 October 2006), New York University School of Law, accessed October 21, 2013, http://www.unhchr.ch/huricane/huricane.nsf/0/40032f0dc00bf784c12572140031760a/$FILE/TransitionalJustice.pdf.

CESCR General Comment No 3: "The nature of States parties obligations (Art. 2, par. 1)" (12 December 1990).
CESCR General Comment No 15: "The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)", UN Doc E/C.12/2002/11 (20 January 2003).
CESCR, General Comment 21: "Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)", UN Doc E/C.12/GC/21 (21 December 2009).
"Future We Want—Outcome Document"—UN Conference on Sustainable Development in Rio de Janeiro (20–22 June 2012), accessed October 23, 2013, http://sustainabledevelopment.un.org/futurewewant.html.
ILC Study Group, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Conclusions of the Work of the Study Group" (A/CN.4/L.702) (18 July 2006).
Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, "A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development", (2013) Executive Summary, accessed October, 22, 2013, http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf.
"Report of the Office of the High Commissioner for Human Rights [OHCHR] on the relationship between climate change and human rights", UN Doc A/HRC/10/61 (15 January 2009).
Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc S/2004/616 (23 August 2004).
Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc S/2004/634 (12 October 2011).
KLH Samuel, ND White, and AM Salinas de Frías, "UN Reform, the Rule of Law, and Counter-Terrorism: How Can Past Lessons Inform Future Responses?" (University of Nottingham, 2012), accessed December 20, 2013 http://www.clubmadrid.org/img/secciones/un_reform_report_march_2012-final.pdf.
Secretary-General Press Release, "Secretary-General Presents Five-Year Action Agenda to General Assembly, Highlighting Killer Diseases, Sustainable Development, Preventive Approaches as Priorities", SG/SM/14081 (25 January 2012).
Summary Report: "Civil Society Consultation Conducted by the UN Non-Governmental Liaison Service (UN-NGLS) For the UN Secretary General's High-level Panel on Global Sustainability" (March 2011), accessed October 22, 2013 http://www.un.org/wcm/webdav/site/climatechange/shared/gsp/docs/Summary_Report_-_UN-NGLS_Consultation_for_the_Global_Sustainability_Panel.pdf.
"The Secretary General's Five-Year Action Agenda", (25 January 2012), accessed October 22, 2013 http://www.un.org/sg/priorities/sg_agenda_2012.pdf.
"Plan of Implementation of the World Summit on Sustainable Development 2002", accessed April 21, 2014 http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

Instruments

CAT—Convention against Torture 1984
ICCPR—International Covenant on Civil and Political Rights 1966
ICESCR—International Covenant on Economic, Social and Cultural Rights 1966
UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963

Cases

Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Reports 7.
Case Concerning Pulp Mills [2010] Judgment of 20 April 2010.
Iron Rhine (Belgium/Netherlands) [2005]) Award of 24 May 2005.
Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351.
R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58.
al-Jedda v United Kingdom (Application No 27021/08) ECtHR 7 July 2011.
Sayadi and Vinck v Belgium UN Human Rights Committee (CCPR), Communication No 1472/2006, CCPR/C/94/D/1472/2006 (22 October 2008).
Shrimp-Turtle dispute (United States—Import Prohibition of Certain Shrimp and Shrimp Products) 12 October 1998, 38 ILM (1999) 118.